IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.637 OF 2003.

Abdul Jabar Mohammed Ishaq
and Anr. : Appellants.

versus

Ravindranath Rupa Prajapati
and ors. : Respondents.

Mr.M.U.Pandey for the appellants.
Mr.N.G.Thakker with Mr.J.Reis and Mr.G.C.Mohanty i/by Kirti N. Damani & Co. for Respondent No.9.
Mr.S.V.Shetty for Respondent Nos.1,3,7 & 8.

CORAM : D.G.DESHPANDE,J.

DATED : 20th APRIL 2005.

JUDGMENT

1. Heard Mr.Pandye for the appellants. Mr.Thakker with Mr.Reis for Respondent No.9 and Mr.Shetty for respondent Nos.1,3,7 & 8. The appellants are the original plaintiffs. They had filed a suit against all the ten defendants claiming injunction against them not to create

third party rights in respect of land bearing survey Nos.198, 198 (Part) and 311 of village Kurla, Taluka Kurla, Bombay Suburban District admeasuring 16 acres and 16.5 gunthas in that suit. An objection was raised by the defendants under Section 69(2)(a) of the Indian Partnership Act, 1932. The City Civil Court while passing the order dated 17.02.2003 came to the conclusion that suit was not maintainable and, therefore, the motion of the plaintiff was dismissed. The court recorded the findings that the suit was not maintainable and then dismissed the suit. It is this order that is challenged by the appellants/plaintiffs.

2. The first contention of the appellants/plaintiffs was that even though the court gave findings on 17.02.2003 that the suit was not maintainable, it committed an error in dismissing the suit a month thereafter without there being any cause for doing so and when the matter was not on board.

3. In this regard, the counsel for the respondents contended that if while hearing the matter of the plaintiffs, the court had come to

the conclusion that the suit was not maintainable, then there was no question of again hearing the plaintiffs on that point and continuing the suit on record and, therefore, the order of dismissal of the suit, though passed belatedly, was not wrong at all.

4. This contention of the respondents' advocate has to be accepted and, there is no illegality in holding on one date that the suit was not maintainable and then dismissing the suit on some other day.

5. Secondly the question is, whether the court was justified in upholding the objection of the defendants about maintainability of the suit under section 69(2)(a) of the Partnership Act i.e. the Amended Section 69(2A) in Maharashtra provides which reads as under :-

> "69(2-A) :- No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing

> as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm."

6. The defendants raised aforesaid objection on the basis of plaint itself and, therefore, since the maintainability of the suit with reference to the aforesaid legal objection is to be decided, only the plaint that has to be primarily and basically looked into.

7. Another objection of the appellants/plaintiffs was that even if the defendants have raised objection about maintainability of the suit, the Court should have been framed preliminary Issue; the parties should have been allowed to adduce evidence and, then Issue should have been decided. I do not find it was necessary for the trial Court to go through all those stages. If the objection was raised by the defendants on the basis of plaint and if the objection could be decided without adducing any evidence and, if the plaintiffs, at

the relevant, did not insist that they wanted to lead evidence and they were permitted to do so and, if the trial Court has not rejected the prayer of the plaintiffs in that regard, then now the appellants can not contend that preliminary issue should have been framed and the parties should have been allowed to adduce evidence. The objection raised by the respondents was specific with reference to the specific provisions of law. The plaintiffs knew what that objection was and what would be the consequences of that objection and made their submissions before the trial Court without making any grievance of any kind and, therefore, they cannot be permitted to agitate that they should have been allowed to lead evidence. This objection of the appellants does not survive.

8. In order to sustain that objection under Section 69(2)(a) of the Partnership Act what is necessary for the defendants to prove is;

1] that the suit is filed in a Court of Law;

2] that that suit is to enforce any right for the dissolution of a firm or for

accounts of a dissolved firm or any right or power to realise the property of a dissolved firm; and

3] that it should have been instituted on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm.

9. The persons i.e. the defendants who have raised this objection can succeed if they satisfied all these requirements and, therefore, it has to been seen whether these requirements are satisfied by the defendants from the plaintiffs. A perusal of the plaint shows that the reliefs are claimed in respect of land bearing Survey Nos.198, 198 (Part) and 311 of village Kurla, Taluka Kurla, Bombay Suburban District admeasuring 16 acres and 16.5 gunthas. This land was acquired by defendant No.10 as tenant from the then owner Kishanchand Revchand. Then para 5 of the plaint, the plaintiffs have stated that the plaintiffs along with some other persons agreed to together develop the land bearing survey Nos. 198, 198 (part) and 311 of

village Kurla, Taluka Kurla, Bombay Suburban District in the name and style of "Masood Estate" and accordingly the said land became the assets of the said partnership firm of M/s.Masood Estate. In the same para the plaintiffs have stated that till this date i.e. till the date of filing of the suit the asset of the said partnership/property is not yet divided or distributed amongst the partners of the said firm. Then the plaintiffs have given history of other litigations in respect of the said property and, in para 8, they have stated that S.C.Suit No.8523 of 1974 was disposed of on 7.1.1991 and the Court Receiver, High Court, Bombay was discharged as the Receiver and accordingly the Court Receiver handed over the possession of the said entire land to the defendant No.10 for and on behalf of the partners of the firm M/s.Masood Estate. This was in 1991. Then in para 9 the plaintiffs have stated that the predecessor of defendant Nos. 1 to 8 purported to sell a part of the land to defendant No.9. This was in the month of March 1997. This sale was bad in law. Because in March 1997 the Court Receiver was in possession of the property. Therefore, according to the plaintiffs, the agreement of sale or

transaction between the predecessor of defendant Nos. 1 to 8 and the defendant No.9 is illegal.

10. Without prejudice to the above-mentioned, the plaintiffs further contended that defendant No.10 had taken the land on tenancy and brought the right of the firm. Then in para 10 of the plaint, again the plaintiffs have stated that after the defendant No.10 put in possession, he and the plaintiffs were in joint possession of the land. But further they have stated that without prejudice to this contention in any event the plaintiffs and defendant No.10 were put in possession of the land as constructive trustees for and on behalf of the plaintiffs. But the act of development was an interference of the plaintiffs' use, occupation and possession of the land. Thereafter in para 10 at the end the plaintiffs have stated that the defendant No.9 is executing work development upon the said land and is constructing buildings thereon in collusion with the defendant No.10 and by committing fraud upon the plaintiffs in as much as the agreement was entered into by and between the predecessor of the defendant Nos. 1 to 8 and defendant No.9 when the Court Receiver was in possession and

thereafter the land was in possession of the plaintiffs through the defendant No.10

11. The objection under Section 69(2)(a) is raised by the defendants in the background of the aforesaid pleadings. Defendant No.10 was admittedly an partner of firm M/s.Masood Estate right from the beginning and it was he who had brought this property as partnership property and admittedly there were no allegations of the plaintiffs that the partnership firm was dissolved at any time; that the accounts were taken, therefore, in fact this suit filed by one partner against other partner in respect of the property of the firm.

12. It was also one of the contentions of the respondents that admittedly, the plaintiffs were not in possession of the property but they filed the suit only for seeking injunction and no relief of possession was sought. Therefore, the suit was not maintainable.

13. As against this, the counsel for the plaintiffs/appellants contended that they had obtained leave under the Code of Civil Procedure

to add the claim of possession subsequently. Whatever that may be, the question that is to be decided is, whether the defendants are raising objection under Section 69(2)(a) succeeding doing so and in spite of the exhaustive arguments by the counsel for the appellants it has to be held on the basis of the aforesaid contentions in the plaint that this is a suit squarely covered and hit by the section 69(2)(a) of the Partnership Act.

14. After the arguments of Mr.Pandey, appearing for the appellants, were heart by me in extensive, I put three specific questions to him regarding the nature of plaintiffs' right in the property. Those questions were :-

1. Whether the plaintiffs had filed the suit in respect of the property of an existing firm ?

2. Whether it was a suit in respect of the property of a dissolved firm ? or

3. Whether it was a suit in respect of the property in his individual capacity.

The last question was put by me with reference to the surrender deed which has been executed by other partners in their individual capacity and the counsel for the appellants contended that his suit falls in the last i.e. third category.

15. Reference in this regard was placed by Mr.Pandey for the appellants on paras 8 and 10 of the plaint wherein the plaintiffs have stated, "after the defendant No.10 is put in possession of the said land he and the plaintiffs are in joint possession and defendant No.10 was put in possession as constructive trustee for and on behalf of the plaintiffs." I have already noted that the plaint was very cleverly drafted because the plaintiffs knew all the legal obstacle in their way. Not a word has been stated by the plaintiffs as to what happened to the partnership firm. But the fact remains that this is a suit filed by the plaintiffs in respect of the property of the partnership firm and against the defendant No.10 and other defendants who are the partners of the firm and, though the relief of injunction was only sought, leave under Order II Rule 2 of the Code of Civil Procedure is also

obtained to claim possession. Therefore, this is a case squarely coming under section 69(2)(a) and hit by the aforesaid provisions.

16. The question involved is very short i.e. with reference to the aforesaid objection under section 69(2)(a) and as rightly argued by the counsel for the respondents it has to be decided with reference to the allegations in the plaint; the nature of the suit filed and, while considering the plaint the court can also look into not only what is alleged, but what is cleverly avoided by the plaintiffs in order to get out of the clutches of the legal obstacles in their way.

17. The counsel for the appellants tried to contend that neither the plaint nor the motion was addressed against the defendant No.10, nor any relief was claimed. This is nothing but an arguments for the sake of arguments. Without joining the defendant No.10, the plaintiffs could not have claimed any relief. The plaint, as presented, is squarely and clearly affected by and hit by under section 69(2)(a) of the Partnership Act. Therefore, there is no merit in

this appeal. Hence the order :-

:ORDER:

. The Appeal is dismissed with costs.

[D.G.DESHPANDE]

20/04/2005 JUDGE.

. After the order was pronounced the counsel for the appellants prayed for staying the operation of the order. In fact, in this case grant of any further stay will seriously affect the rights of the respondents which are found to be true and genuine. However, two weeks stay as a last chance is granted. No further extension will be granted on any count.

[D.G.DESHPANDE]

20/04/2005 JUDGE.